United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1341

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ANGELO GERBASIO,

Defendant-Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,

Appellee,

-against-

ANGELO GERBASIO,

Defendant-Appellant.

- X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PRELIMINARY STATEMENT

The appellant ANGELO GERBASIO appeals from a judgment of conviction rendered in the United States District Court, Eastern District of New York (Judge John F. Dooling, Jr.) whereby the appellant was convicted after trial following verdicts of guilty as found by the jury on count 1 of the indictment, charging a violation of 18 U.S.C. 659 and 2, theft from interstate commerce and count 2 of the indictment, charging a conspiracy under the general conspiracy statute, 18 U.S.C. 371. As a consequence the appellant on July 9, 1976 was sentenced to a jail term of 3 years on each count, to be served concurrently, 1895C3651, to be confined 3 months, execution of remainder suspended, but probation 3 years from date of release from custody.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

1. Was the arrest of the appellant illegal and if so, did the illegality thereof mandate the suppression of all statements attributed to the appellant even though at one phase of the questioning the appellant was given the warnings as to his right of silence and right to counsel (4th and 5th, 6th Amendments to the Federal Constitution)?

2. Where the Court suppressed statements attributed to the appellant initially given upon arrest, but allowed other statements allegedly given by the appellant later after he was given warnings as to his right of counsel and right of silence, was the original illegality of the prior statements attenuated?

3. Where two defendants made statements to the authorities that shifted the penal liability to the other defendant, should the Court have granted a severence of trial to the appellant instead of redacting the statements?

4. Where the Court charged the jury that where knowledge of the stolen nature of the property in question can arise from possession thereof and told the jury further that the inference could be rebutted by anything in the evidence, was the Court correct in redacting the statements of the appellant to the effect that the co-defendant knew about the transaction and the statement attributed to the appellant disclaimed any knowledge of wrongdoing?

5. Should the Court have charged the jury as requested that to find the appellant guilty under both counts the jury had to find the appellant had a stake in the venture and wanted it to succeed?

6. Was there sufficient evidence to support the verdicts?

THE PRE-TRIAL MOTION TO SUPPRESS THE ADMISSIONS ATTRIBUTED TO THE APPELLANT

The appellant prior to trial applied to suppress the statements attributed to him (1)*. The Court directed an evidentiary hearing. At this hearing John Westhoff, an agent, testified that on October 23, 1975 he was at the John F. Kennedy Airport with another agent named Joseph Phelan. These agents had Pan American Cargo Building #67 under observation. They were in radio contact with other agents (4, 6).

At 2:35 A.M. of October 23, 1975 the agents observed a truck at bay 9 being loaded by the co-defendant DeLucia (6, 7). An employee of Pan American named Godoy learned this from another employee (7, 8).

DeLucia was observed moving the truck alone. He stopped it, left it and went into a building. Later at 8:00 A.M. DeLucia and the appellant entered the truck. DeLucia drove the truck to the entrance gate. As the witness

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* ( ) This refers to the pagination of the appendix.

would have "they" then "passed" the truck and drove away (9, 10, 11).

The agent followed the truck which proceeded to Staten Island being driven by DeLucia (11-13). At Staten Island the truck slowed down and at intervals stopped. The truck then turned around and proceeded back from the direction it came (13, 14). This indicated to the agent that the occupants of the truck knew that they were being followed (14). Ultimately the authorities stopped the truck (14). Westhoff announced his office and questioned DeLucia asking him what he was doing. DeLucia replied "ask Angelo. I am helping him." (14-16). DeLucia was arrested (16). DeLucia was then advised of his rights, the agent reading from a card (16). DeLucia was taken to the FBI office at Kennedy Airport (16, 19). At the FBI office the agent gave DeLucia a paper to sign. This was a waiver of DeLucia's rights (17, 18, Government's Exhibit 1).

Other agents opened the truck and retrieved cartons (20). DeLucia was questioned at the FBI office at the airport. Before questioning DeLucia, DeLucia was given a writing which he signed (Government's Exhibit 3, 21, 22). An agent named Jules witnessed the execution of this (23-25). DeLucia upon being questioned a second time by this witness and Jules admitted that he loaded the truck, drove it, left it but stated he had nothing to do with the theft and that he was merely helping another Pan American employee Gerbasio

(26, 27). This is reported on Government's Exhibit 4 with a statement that Gerbasio had the keys to the truck given to him from a supervisor (27, 29).

Another agent named Yoos on direct examination testified as to the arrest of the appellant with DeLucia at Staten Island (30, 31). He admitted that Gerbasio was a passenger in the truck at the time it was stopped (31, 32). Yoos displaying a firearm at the time the truck was stopped, asked the appellant for the "papers". Gerbasio replied "ask Mario. He has them." (32, 33). After this reply the witness advised the appellant of his "rights" (33, 34). Gerbasio was directed to leave the vehicle and join the co-defendant and told he need not say anything else at that "point" (35).

On cross examination Yoos testified he displayed the gun and then questioned the appellant and then arrested the appellant. It was only then that the appellant was advised of his rights (37, 38). That when the appellant was taken to the FBI office at the airport, the witness advised him of his "rights" (30, 31). When the agent told the appellant that the truck contained stolen goods, the appellant replied that he didn't know of the theft (40-42).

The appellant allegedly told the authorities that when he arrived for work at the airport DeLucia told him that he had a "heavy load" but that the appellant should ask

no questions nor tell anyone (41). The agent never told Gerbasio that the co-defendant DeLucia involved him (44).

When Gerbasio was initially searched no keys to the truck were on his person (45, 46).

Walsh, another agent, testified (47). On direct examination he related that he was one of the federal agents who on October 23, 1975 was with the group of other agents investigating the contemplated theft (47, 48). His role was to handle the radio communications (48). The area under observation was the Cargo Building No. 67, Doors 8-9 (49).

He was told by Godoy, an employee of Pan American that 30 cartons were moved to two tow trucks and Godoy identified the numbers on the trucks (50, 54). Godoy also described two bills that were to accompany the 30 cartons (51, 52). Godoy informed him that the cartons were not supposed to be moved (52, 58).

Walsh radioed this information to the agents who were stationed in automobiles in the vicinity (55).

Jules, an agent, said that on October 21, 1975 he met with a Mr. Butta who was the Import Director for Pan American and Perillo, who was in charge of security (58-61). Butta told Jules that Simon, another employee of Pan American, told him that he was approached by DeLucia who told him about the contemplated theft (62, 63). Later Jules joined the group of agents and went with them when the truck was stopped at Staten Island (63-65).

He related that Godoy told him that he would be able to see whether DeLucia would load the cartons in the truck and that these cartons were not to be removed from the airport (60, 61). That Walsh told him that DeLucia approached Simon and told him about the proposed theft (60, 61).

On October 23, 1975 he was with the other agents and followed the truck when it was stopped at Staten Island (68).

When the truck was stopped Yoos, the other agent who previously testified, had his gun drawn. Jules ordered Gerbasio out of the truck (70). Then and there the appellant was questioned and responded. He was subsequently "formally" arrested and given the warnings (71, 72).

Gerbasio was later questioned also at the FBI office at John F. Kennedy Airport (73). Government's Exhibit 5 in evidence was writings acknowledging that the warnings were given to the defendant (74, 75).

The Government conceded that the appellant was not given the proper warnings when he was arrested at Staten Island (70). Nor that the responses were spontaneously made (77).

The statements given by the appellant when the truck was stopped were suppressed (98, 139).

The statements given by the appellant when he was taken to the FBI office and acknowledged that his rights were afforded him, were admitted into evidence at trial

except that they were redacted, all of which will be hereinafter explained. The basis for the redaction was that his statements would implicate the co-defendant. Similarly, the statements of the co-defendant which implicated the appellant were admitted at trial but those statements were redacted because they referred to the appellant.

STATEMENT OF THE CASE AGAINST THE APPELLANT:

Joseph Simon testified that he was an employee of Pan American Airlines. That on October 16, 1975 DeLucia met him at the airport or place of employment and proposed that he arrange with him a theft of certain freight to be selected by DeLucia. Simon would then be given $200.00 to $250.00 for his aid (181, 183). DeLucia also told Simon where at the airport a truck to be loaded would be (184). DeLucia told him that another person would be with him (184, 186). However, DeLucia did not name that person saying to Simon that if there were difficulties only he would be involved (186, 187).

Simon thereafter told Godoy, another employee, what DeLucia told him (188, 189). The next day, October 21, 1975, Simon spoke to Butta about the proposed theft (190). Butta was an executive of Pan American Airlines. On October 23, 1975 DeLucia made the selection of the freight to be taken and Simon was told the appropriate time to arrange for the theft (191). At 2:30 A.M. Simon brought

the freight to the truck and DeLucia, alone, loaded the truck (193).

Godoy next testified (195). He was the Cargo Manager for Pan American. At 2:00 A.M. on October 17, 1975 Simon, whom he knew, told him that DeLucia contemplated a theft of cargo the following Wednesday, October 23, 1975 (197-200). On October 21, 1975 Godoy spoke to Perillo and two federal agents, namely Jules and Walsh (201, 202). He told them what Simon reported to him (203).

On October 23, 1975 he went to the Cargo Building #67. There Simon told Godoy where the cargo was to be taken from by "Mario", not giving the last name of "Mario". Simon also gave him some slips of paper relating to the freight (205).

Yoos, a federal agent, testified that on October 23, 1975 at John F. Kennedy Airport he was observing Cargo Building #67 (207-209). At 2:45 A.M. he saw DeLucia load a truck alone with cartons (209). DeLucia then drove the truck a short distance and entered a building alone (209, 210). At 8:04 AM DeLucia returned to the truck, this time with the appellant Gerbasio. They entered the truck, Gerbasio going to the passenger side and DeLucia to the driver's side (211). The truck then proceeded to the fueling area (212). "They" loaded the truck, the appellant applying the feed for the fuel. This done, they re-entered the truck, DeLucia entering at the driver's side (212). The truck

then proceeded on to a highway. There it stopped shortly and then continued towards the direction of Staten Island. At Staten Island the truck left the main highway at intervals, then re-entering the highway at other intervals (213). When it finally re-entered the main highway it proceeded back. The authorities at this phase stopped the truck (214).

Yoos went to the truck and displaying a gun, spoke to Gerbasio and then arrested him (215, 216). Gerbasio was then taken back to the airport (216).

On cross examination Yoos testified that after arresting the appellant he brought him to the driver's side of the truck (216, 218). That the appellant was advised of his rights, he was standing next to the co-defendant (218). At John F. Kennedy Airport Gerbasio was again advised of his rights (219, 220). That the appellant executed a government form acknowledging he was so advised at 10:19 A.M. (220-223, Appellant's Exhibit A). Appellant then in response to questioning from the agents gave them a statement (225, 226).

Jules, another agent, testified on direct examination as to the admissions attributed to both defendants (226, 227). After testifying about the waiver by the defendants, Government's Exhibit 7, he related what each defendant said (227, 228).

Gerbasio told the authorities that on October 23, 1971 he arrived at work at the airport at 7:15 A.M. That

at 8:00 A.M. he was asked to help "on a truck". He didn't know where he was going nor did he know whether the truck had any freight. That he believed after some conversation in the truck he was going to Staten Island for a pick-up at a pier (228).**

Jules then questioned DeLucia (229). Firstly DeLucia waived his rights (230, 231, Government's Exhibit 9). The statement was put in the Government's report, Government's Exhibit 10 for identification (232).

DeLucia told the authorities that he worked the midnight shift and was in charge of a motor pool. At 7:30 A.M. on October 23, 1975 Chris Whelan, a supervisor (the name taken down was misspelled as it is believed that the last name was Weilan), offered to let him work overtime and he agreed (233). That he didn't know whether there was any freight in the truck; that he did load the truck and move the truck to the side of a building. That he didn't remember what freight was loaded on the truck nor where it was to be transported. That he was told to make a pick-up at a pier in Staten Island (233, 234).

Weilan, on direct examination testified that he was a dispatcher for Pan American (240). That on October 23, 1975 he spoke to Gerbasio who told him he had to attend a union meeting at Hanger 14, it appearing that the appellant was

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** This was the redacted statement.

a shop steward (241). Weilan didn't know whether there was a union meeting (242). That the appellant was scheduled to work at Cargo Building #67. The appellant left him at 8:00 A.M. but this witness didn't know where the appellant went (243, 244).

On cross examination he testified that the appellant was a helper on a truck. That union meetings were frequent (245). The witness was never told when Gerbasio was expected back from the union meeting (246).

This witness also related that if the appellant had to go to a union meeting, he was not assigned for any work (246). On prior occasions, the appellant went to union meetings (247). In such cases, the appellant would not be assigned to any job until after the union meeting was held (248, 249).

In regard to the co-defendant, Weilan admitted that he had the same job as he did (249). If the co-defendant asked somebody to help him he would need the witness' consent, (250).

On re=direct examination Weilan testified that he never assigned the appellant to go to Staten Island as a helper, although this witness' job was to assign the appellant (251). There were no records at Pan American that the defendants were cargo handlers or were to go to Staten Island. No one but this witness would have authorized that trip (253). Nor did this witness ever give the defendants the keys to

the truck although either he or his associate, Matusa, would do so (254, 255). Even if his assistant didn't deliver the keys for the truck, the keys were available in a nearby office and then were accessible to the co-defendant (255, 256).

On further cross examination the witness admitted that while a driver is assigned to a job a driver can select a helper with the witness' consent (257). However, if the appellant had no assignment, he still could have gone as a helper without the witness knowing it (258).

On further re-direct examination the witness testified that the defendant never told the witness about the Staten Island trip (258).

His cross examination was concluded when he testified that the appellant never told him the time of the union meeting (259).

Anthony Matusa testified on direct examination that he was a chauffeur employed at Pan American and he had the same duties as Weilan, the previous witness (260, 261). He knew the defendants who were part of the ground transportation unit at Pan American (263). On October 23, 1975 the appellant was part of his unit. The co-defendant was on a shift that ended at 8:00 A.M. The appellant's shift began at 7:30 A.M. and this was characterized as an overlap (264). Confronted with the records of his employer, Government's Exhibit 12, the appellant's name was on that. This showed that the appellant was designated as a "stand-by" driver, that is, he had no regular assignments (266-268). Govern-

ment's Exhibit 12 also disclosed that on October 23, 1975 the appellant had union affairs to attend as a shop stewart. This was shown by the symbol number 54 (268, 269). This designation was placed on Government's Exhibit 12 after 7:30 A.M. of that day (269).

On cross examination Matusa testified that he didn't know who placed appellant's name on Government's Exhibit 12 (272). When the appellant was performing union functions, he got random assignments (272). These random jobs did not consume a full day so that the appellant could be available for union affairs (273). Weilan designated on Government's Exhibit 12 that the appellant had a union meeting (273).

Further examination elicited from this witness that the appellant could have gotten assignments either before or after the union meeting, either from Weilan or the witness (274, 275). However, this witness never gave the appellant any assignment that morning (275). Nor was the appellant ever assigned to go to Staten Island (275, 276).

An executive of Pan American named Hudson testified on direct examination that he was manager of the ground transportation (276, 277). He knew both defendants as working at a ground transportation job at John F. Kennedy Airport (277). He was the superior to Weilan and Matusa (278).

On October 23, 1975 there was an unscheduled union meeting. The appellant was to attend that meeting (279). When the witness arrived at work that morning, he didn't see

the appellant and he asked another employee where the appellant was. He didn't meet with the appellant (280). Later that day this witness learned that the union meeting occurred and that the issue was resolved (281).

On cross examination this witness admitted that he knew Clinton who was a union representative. That union meetings could occur at any time during the day (282). That there was no specified time for such meetings (282, 283).

On October 23, 1975 there was no fixed time when the union meeting was to be held (283). He was told that the appellant was not present at such meeting (284). The appellant was not told when the union meeting would be held (284).

He received a call from the union representative in regard to the appellant's whereabouts (285).

POINT I

THE ARREST OF THE DEFENDANT, GERBASIO, WAS IN VIOLATION OF THE 4TH AMENDMENT TO THE FEDERAL CONSTITUTION AND THE ENSUING STATEMENTS ATTRIBUTED TO HIM SHOULD HAVE BEEN SUPPRESSED EVEN THOUGH HE WAS GIVEN THE WARNINGS:

Concededly the authorities had no arrest warrant as to Gerbasio. Furthermore, the stopping of the truck was an arrest. See Henry v. U.S., 361 U.S. 98 (1959), at page 103.

Arrest is a 4th Amendment issue. See Davis v.

Mississippi, 394 U.S. 721 (1969); Gerstein v. Pugh, 420 U.S. 103 (1975).

The issue is therefore whether the appellant Gerbasio, either committed an offense in the presence of the agents or whether the agents had reasonable grounds to believe that Gerbasio had committed or was committing an offense.

It is suggested that there was no showing that at the stopping of the truck and the taking of the defendant then and there in custody, that Gerbasio was more than a passenger in the stolen truck. However implicated the co-defendant might have been, Gerbasio did nothing in the presence of the agents disclosing that he was a participant in a crime that was committed. That initially Gerbasio had no document of title was indicative of nothing; this was not sinister. A passenger of a truck as contrasted with the driver will not customarily have such documents. There was no one fact established as to just why Gerbasio would have them. Nor were there any facts showing that Gerbasio handled the cargo or had constructive possession of it at any time, e.g. dominion, control or the right to dispose of it. The product of the seizure of Gerbasio's person, e.g. the statements later given, could not justify the arrest as an arrest or a search and seizure are valid at the inception or not at all. See Miller v. U.S., 357 U.S. 301, 312 (1958); Bumper v. North Carolina, 391 U.S. 543 (1968). It is therefore suggested that the admissions attributed to the appellant whether they were

probative or not, as well as the subsequent investigation, would not validate the arrest. See Davis v. Mississippi, 394 U.S. 721, 723, 724 holding that even though evidence may be probative or of high value to the prosecution, such is not a consideration to determine the validity of a detention.

Even in regard to the fueling of the truck, the most that was before the Court at the hearing level was that a witness for the government testified that "they" fueled the truck (9, 10, 11). But this observation as to the defendant was meaningless. Nothing was shown to the court as to just what role the defendant had as to the fueling of the truck. Even if the defendant did help fuel the truck, that does not indicate that he did so to intentionally aid the commission of a theft. There was no showing of shared knowledge of illegally possessed cargo on the part of the appellant, Gerbasio. In other words, the agents did not see any sinister actions on the part of Gerbasio.

In U.S. v. DiRe, 332 U.S. 581 (1947) the defendant was convicted for possessing counterfeit rationing stamps. The issue before the court was whether the warrantless arrest of the defendant in an auto with two other occupants could be the lawful predicate for the incidental search and seizure had after the arrest. Initially the authorities in that case were informed by an informer that he was to acquire the counterfeit for a person named Buttita. Local authorities and a federal investigator traced Buttita's car and ultimately

saw it parked. They approached it and saw the informant in it holding the counterfeit. The informant told them that he got the counterfeit from Buttita who was seated in the front. Seated next to Buttita was the defendant DiRe. DiRe was arrested and a search and seizure had afterwards was productive. It was held that the arrest was not lawful because the justification to search the car did not carry with it the justification to search DiRe.

Next, the Court held that in the absence of a federal statute, the authority to arrest was based on a New York State statute then existing, namely Section 177 of the Code of Criminal Procedure, at pages 589, 590. New York law was to the effect that to arrest for a misdemeanor, the offense had to be committed in the presence of the arresting officer. The Court held that that was not shown stating on page 592 that:

> "The Government now concedes that the only person who committed a possible misdemeanor in the open presence of the officer was Reed, the ... informer who was found visibly possessing the coupons. Of course, as to Battita they had previous information that he was to sell such coupons to Reed and Reed gave such information that he had done so. But the officer had no such information as to DiRe. All they had was his presence, and if his presence was not enough to make a case for an arrest for a misdemeanor, it is hard to see how it was enough for the felony ..."

The government further argued that DiRe was engaged in a conspiracy, a felony, and that DiRe was arrested because the authorities had reasonable grounds to arrest him for a

felony, namely conspiracy. On page 593 it was held that:

> "... An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who accompanies a criminal to a crime rendez vous cannot be assumed to be a bystander, foreceful enough in some circumstances, is far fetched when the meeting is not secretive or in a suspicious hideout but in broad daylight, in plain sight of passerbys, in a public street of a large city and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If DiRe had witnessed the passing of papers from hand to hand, it did not follow that he knew that they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit. ... Presumptions of guilt are not lightly to be indulged from mere meetings ... "

It is further suggested that 18 U.S.C. 3552 was the statutory predicate for the arrest. That statute states in part that:

> " ... and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without a warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony ..."

It is respectfully submitted for the aforementioned reasons, the agents at the time of the arrest of the appellant, Gerbasio, were not observing the commission of any crime on his part in their presence. It is submitted, that "presence" as used in the statute means conscious presence. In other

words, it would seem that the presence of a person where there is an agent does not allow the agent to arrest that person and conduct a search and seizure hoping to get information to justify the arrest. For the aforementioned reasons it is also submitted that there were no reasonable grounds for the agents to have arrested the appellant, Gerbasio.

U.S. Ex Rel. McArthur v. Rundle, 402 F. 2d 701, 705 (Cir. 3rd, 1968) held the mere presence of a person in a suspected motor vehicle does not deprive such person of his right of privacy. In Pearson v. U.S., 150 F. 2d 219 (Cir. 10th, 1945) it was held that the fact that a defendant had a companion who had the reputation of being a bootlegger was insufficient to establish reasonable cause. In Sibron v. New York, 392 U.S. 40 (1968) it was held that probable cause was unestablished by a suspect talking to a number of narcotic addicts over a lengthy period of time.

It is therefore the appellant's position that the arrest was illegal and that thereby the subsequent questioning of the appellant was void even though the appellant was given warnings as to his right of silence and his right to counsel. See Brown v. Illinois, 422 U.S. 590 (1975).

It now appears that the affect of the illegal arrest of the appellant Gerbasio reached the admissions attributed to him. It will be recalled that the second set of statements attributed to the appellant Gerbasio were preceded by proper warnings. But the propriety of the warnings did not obliterate

the taint flowing from the illegal arrest. In Brown v. Illinois, 422 U.S. 590 (1975) the defendant was illegally arrested. After being given proper warnings, he made a series of incriminating statements to the authorities. It was held that the given of the warnings in compliance with the 5th and 6th Amendments to the Federal Constitution did not obliterate or attenuate the taint flowing from the illegal arrest, a 4th Amendment consideration. The Court reasoned that the authorities observing the accused's rights as to be silent and to have counsel, did not work a forfeiture of the remedies created to enhance the values of the 4th Amendment to the Federal Constitution. That the two amendments involved different values. That warnings per se do not satisfy the need to fashion remedies to hold the state (or the federal government) to the observance of the 4th Amendment to the Federal Constitution, and to insulate the Courts from being the repositories of illegally obtained evidence, at pages 602-603.

POINT II

THE SECOND SERIES OF STATEMENTS ATTRIBUTED TO THE APPELLANT, GERBASIO, SHOULD HAVE BEEN SUPPRESSED BECAUSE THE TAINT FLOWING FROM THE FIRST SERIES OF STATEMENTS WHICH WERE SUPPRESSED, WAS NOT ATTENUATED BY THE GIVING OF WARNINGS PRECEEDING THE SECOND SERIES OF STATEMENTS

It will be recalled that the Court granted the appellant's motion to suppress the first series of statements because the warnings given to the appellant were insufficient

(70, 77, 98, 139, 149, 150).

The government's evidence showed that the appellant was "formally" arrested when the truck was initially stopped and the appellant illegally questioned (71, 72). Thereafter the appellant was driven back to the airport in the custody of the agents. There he was again questioned after being given the warnings (71, 72). If the appellant's "formal" arrest was based on the illegally extorted admissions attributed to him, then it is submitted this is a factor that not only went to the illegality of the arrest, but as will be argued hereinafter, was a factor that reached the second series of statements notwithstanding the giving of the warnings to the appellant. Next, the appellant was in continued custody when he was taken to the airport and questioned. Finally, the second series of admissions despite the warnings, were within the reach the exclusionary rule itself contained within the 5th Amendment's right of silence, and the 6th Amendment guarantee of counsel. In regard to attenuation, it is useful to restate a holding in Brown v. Illinois, supra, 422 U.S. 590 at page 604 that:

> "Brown's first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever ..."

It is submitted that the second series of statements preceeded by the warnings should have been suppressed because they were linked to the first series. The authority of

Harrison v. U.S. 392 U.S. 219 is submitted to this Court. There three confessions made by the defendant were put in evidence by the government at the defendant's first trial. The defendant at that first trial testified to his version of the events. In other words, the testimony was to blunt the effects of the confessions. After being found guilty the defendant appealed and the conviction was reversed and a re-trial ordered. On the re-trial the prosecution read to the jury the defendant's testimony given at the first trial. It was held that this was improper because the defendant never voluntarily waived his right of silence at the first trial, because the confession, improperly received in evidence, was the motivating factor for the adoption of the trial strategy to testify. On page 224 it was stated:

> "The remaining question is whether the petitioner's trial testimony was in fact impelled by the prosecution's wrongful use of his illegally obtained confessions. It is of course, difficult to unravel the many considerations that might have lead the petitioner to take the witness stand at his former trial. But, having illegally placed his confessions before the jury, the government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. 'The springs of conduct are subtle and varied ... ' 'One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.' ..." (Internal citations omitted)

In other words, it may be a nice psychological question as to whether the second series of statements

attributed to Gerbasio were involuntary. However, while not requesting a per se exclusionary approach, nevertheless, to put the burden on the defense to show there was no attenuation, is to place an impossible burden on the defense. The facts in Harrison were certainly more favorable to attenuation than the facts in this case. In Harrison, trial testimony was given when the accused was represented by counsel; the atmosphere was that of a courtroom presided over by an impartial judge and of course with counsel present at all times. Harrison testified because of trial strategy. In this case Gerbasio was arrested immediately and questioned on an open highway surrounded by agents. He was in custody at all times. He was taken to the agent's office at the airport after he made the initial statement, rather than to a neutral and detached magistrate. He was transported to the agent's office for the purpose of questioning.

There was no explanation offered by the government why after initially questioning the defendant and getting the responses, the government had to again question the defendant. If the agents took the trouble to escort the appellant to the office at the airport, it would have taken the same effort to bring the defendant to a magistrate in perhaps less time. See Rule 5(a), Federal Rules of Criminal Procedure, Mallory v. U.S., 354 U.S. 449 (1957), at page 455 where it was stated in part:

"... The duty enjoined upon arresting officers to arraign without unnecessary delay indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession."

"The circumstances of this case preclude a holding that arraignment was without unnecessary delay. Petitioner was arrested in the early afternoon and was detained at headquarters within the vicinity of numerous committing magistrates. Even though the police had ample evidence from other sources than the petitioner for regarding the petitioner as a chief suspect, they first questioned him for approximately a half hour ..." (Internal quotations and citations omitted).

Appellant has therefore approached the issue here, and this without in any way detracting from the force of Harrison v. U.S., supra, 391 U.S. 219, in accordance with this Court's recent ruling in Tanner v. Vincent, Court of Appeals, Second Circuit, August 27, 1975, slip opinion, 5267 at page 5275.

Another circumstance therefore that can be considered is that there was no proof that the appellant prior to being questioned a second time and upon being given the full warnings, was also advised that the prior questioning was improper and that the statements attributed to him were illegally elicited. Perhaps the agents did not realize this. If they didn't, and thought that their questioning was proper,

there was simply no point to engage in relay questioning for a second period. Instead the appellant should have been arraigned before a magistrate.

As stated in 56 California Law Review, 579 (1968), "The Fruit of the Poisonous Tree Revisited and Shepardized", Pitler, at page 617:

> "A suspect who confesses is not perpetually disabled from confessing again. If he is made aware of the inadmissibility of the initial confession after he has consulted with counsel who has so advised him, he may, nevertheless conclude that it would be to his best interests to confess. Therefore, there appears no logical reason to treat the consecutive confession, or the confession as the fruit of other evidence, any differently than the problems of Nardone and Silverthorne."

On pages 618 it was further stated that:

> "If it later develops that the first confession was invalid, a subsequent confession should be inadmissible absent a showing that the accused has consulted with a lawyer and the latter was aware of the initial confession. Assuming that no absolute right to counsel exists after the commencement of judicial proceedings, should the right exist after a confession has been obtained? The police have secured a waiver, commenced interrogation and obtained their desired result. If anything else need be done with the accused, why should not access be controlled by counsel? ..."

In Westover v. U.S., 384 U.S. 436 (1966), Westover was initially seized by state police and questioned as to certain state crimes. However the federal authorities were also informed of Westover's arrest. When the state police were finished questioning Westover, the federal authorities

questioned him and ultimately elicited confessions. The federal authorities did advise Westover of his right to be silent, that if he did make a statement it could be used against him and that he also had the right to counsel. The statements given to the federal authorities were suppressed, it being stated in part on page 496 that:

> "Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There was no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed. (Emphasis supplied).

POINT III

THE COURT SHOULD HAVE GRANTED THE APPELLANT GERBASIO A SEVERANCE RATHER THAN REDACTING THE APPELLANT'S STATEMENT AS TO THAT PORTION IMPLICATING THE CO-DEFENDANT AND EXCULPATING HIMSELF: FURTHERMORE THE EXCULPATORY PORTION OF THE APPELLANT'S STATEMENT WAS ADMISSIBLE.

The Court allowed the joinder of the defendants despite the fact that each defendant shifted the blame to the others. Rather than directing a severance or a separate trial, the Court ordered a redaction of the two respective set of statements. The redaction obliterated the portion of the

appellant's statement which ran in the direction of the co-defendant (164, 168-170, 175, 176, 227, 228). At page 228 of the appendix the redacted statement was as follows:

> "A. Mr. Gerbasio stated that on the morning of October 23rd he went to work at 7:15. At about 8:00 A.M. he was asked to help on a truck. He stated that he had no idea where he was going and did not know that the truck contained any freight. He stated there was some conversation in the truck and he believed he was going for a pick-up at some pier in Staten Island." (228).

By exercising the other portion of the statement, the jury was left with the redacted statement to the effect that the appellant was asked to help. Who asked him, of course, was left to speculation by the jury. Further, that the appellant had no idea of his destination stating it was somewhere in Staten Island or that he had a conversation in the truck. Again the jury were thus left to speculate as to the substance of that conversation.

In U.S. v. Crane, 499 F. 2d 1385 (Cir. 6th, 1974) the trial court grappled with the issue of the right of confrontation considered in Bruton v. U.S., 391 U.S. 123 (1968).

In so doing the trial court did not direct a severance as to certain defendants, whom a co-defendant implicated in a post-arrest confession. Instead the Court scheduled the giving of the case as to two different groups of defendants in such order that the jury could consider the

case as to a count as to the defendants implicated in the co-defendant's statement. In other words, the trial was bifulcated so that in considering the case against certain defendants the jury was not told that another defendant implicated such defendants. While that procedure in that case was disapproved, the Court did state on pages 1387-1388 that:

> "Ever since Bruton was decided trial judges have struggled to find ways that defendants may be tried jointly even though one has given a statement to the police... Their purpose has been to obey the commands of Bruton and at the same time to achieve the substantial saving of judicial time that may be accomplished through a joint trial. Given what appears to be an ever increasing demand by litigants for access to federal courts, efforts by trial judges to keep their dockets current are to be commended. Yet justice, not judicial economy, is the first principle of our legal system. And under those circumstances may well-intentioned efforts to conserve judicial time be permitted to prejudice the fundamental right of a criminal defendant to a fair trial."
>
> "Despite the lack of prejudice to defendant arising from the trial technique employed here, we entertain serious doubts about the propriety of the general use of the bifulcated trial as a means of preserving joint trials while still complying with the mandate of Bruton. If the jury were to find one of the defendants guilty, there could be a serious question whether the same jury could later give his co-defendant the dispassionate and unprejudiced hearing required by due process and by the Sixth Amendment. In such case the risk of prejudice would be unacceptably high. And of course the trial judge cannot predict at the beginning of the trial what the jury's verdict will be as to the defendant whose case is first presented. Conceivably a procedure may be discovered that will make possible a reconciliation of the efficient use of court time and the constitutional guarantee of the right to confrontation. In

the meantime, whenever there is a possibility of prejudice to either defendant, the safest course would appear to be traditional use of the severance device."

It is respectfully submitted that by not directing a severance of the trial, but redacting the statement, the Court in effect suppressed evidence favorable to the appellant and deprived the jury from hearing all the facts.

Rule 106 of the newly adopted Federal Rules of Evidence states that:

"REMAINDER OF OR RELATED WRITINGS OF RECORDED STATEMENTS. When a writing or recorded statement or parts thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

In "Weinstein's Evidence" at pages 106-108 it was stated in part that:

"One of the most unsettled areas prior to the enactment of the Rule 106 was whether the prosecutor was required to introduce the whole confession. The general rule was stated ambiguously:

'When a confession is admissible, the whole of what the accused said upon the subject at the time of making confession is admissible and should be taken together, and if the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time which bears upon the subject of controversy, including any exculpatory or self-serving declarations contained therewith.' " (Citations and footnotes omitted).

On pages 106-9 it was stated in part that:

"... By whatever offer the prosecution makes, the defendant should have his request to have the entire confession or most portions he considers exculpatory read to the jury when the prosecutor reads a portion. Forcing the defendant to take the stand in order to introduce the omitted exculpatory portions of the confession is a denial of his right against self-incrimination. ..."

Wharton's Criminal Evidence (13th Edition) pages 99-100:

"Where the statement of a defendant is only part self serving, the entire statement may be received, and the weight thereof is for the jury to determine. ..."

Thus suppressing the exculpatory portion in effect compelled the appellant to testify in violation of his 5th Amendment right. On the other hand, the Court did charge the jury as to the inference flowing from recent possession. The Court told the jury in part that:

"... , unless an innocent explanation of that possession appears from the evidence, you may although you are not required to, infer and conclude that the defendant knew that the goods were stolen goods ..." (293)

The excised portion of Gerbasio's statement was not in evidence. This was the "innocent explanation" of the possession.

Furthermore, the other portion of the charge found on pages 293 and 294 of the appendix relate to the question of "conscious avoidance". Thus the Court told the jury that because of the circumstances of the appellant should have been alerted and if he deliberately failed to inquire or

"close his eyes" to the obvious, for the purposes of avoiding the facts, he could still be held to knowledge of the theft and possession of the fruits of the theft. (293, 294).

It is therefore submitted that the entire statement attributed to the appellant should have been before the jury.

Put another way, the Court correctly charged the jury that the inference could be dispelled by anything found in the evidence. This followed Barnes v. U.S., 412 U.S. 837 (1973). But by the deletion the full impact of the requirement in Barnes was dissipated. The ruling in Barnes reconciled the use of the inference with the demands of the 5th Amendment. Yet the court by excising the appellant's statement gave him the alternative of either testifying, which he didn't have to and didn't, or relying upon that "anything" in the evidence which wasn't there, to rebut the inference.

The portion of the charge as to the failure to deliberately inquire or consciously avoiding the nature of the occurrence, also mandated in the interests of parity that the stricken portion of the utterances attributed to the appellant Gerbasio should have been left in. That portion would have given the jury evidence that it could have considered in connection with the charge. Namely that the appellant relied upon the co-defendant driving to a designated

place and his reliance led to the belief that the occurrence was perfectly proper.

Rule 803 of the Federal Rules of Evidence in subdivision (2) states:

> "HEARSAY EXCEPTIONS:
>
> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> "(1) ***
>
> "(2) Excited Utterances. - A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

It is suggested that the entire statements if they were admissible in evidence, should have been given to the jury as part of the "res-gestae". The stricken portion was relevant just as much as an exception to the rule banning hearsay as the other portion of the declaration was admissible under Rule 801 (d)(2) of the Federal Rules of Evidence, stating that an admission is not hearsay.

This brings us to Bruton v. U.S., 391 U.S. (1968). That case is all too familiar and counsel recognizes the Court is fully acquainted with the issues in that case, namely confrontation and the judicial recognition that a jury may be incapable of following instructions.

The co-defendant's statement as redacted and as given to the jury is found on pages 233 and 234 of the appendix. However the last portion on page 234 states that:

"He stated he could not remember what freight was loaded on this truck nor did he know where the truck - freight was destined to. He also stated that all he could say was that he was told to make a pick-up from the pier in Staten Island and could not furnish any further information." (234)

With the circumstances that the appellant was in the truck and the co-defendant's statement that he didn't know where he was going (but was driving the truck) it was fairly inferable that the passenger of the truck, namely the appellant, was the navigator of the trip. It is submitted that the redacted statement of the co-defendant was within the ruling of Bruton v. U.S., supra.

The jury, it is argued, could have speculated that the appellant was directing the trip, and was in charge of it and that the co-defendant was a mere chauffeur.

It is further put that the government's case against the appellant Gerbasio was circumstantial and even if the redaction was satisfactory Gerbasio was wrongfully prejudiced. Put another way, the "redaction" was not harmless if it were error because there was a scarcity of otner evidence against Gerbasio. See U.S. v. Purdo, 449 F. 2d 649 (Cir. 2d, 1971); Close v. U.S., 450 F. 2d 152 (Cir. 4th, 1971).

POINT IV

THERE WAS INSUFFICIENT PROOF AS TO THE APPELLANT GERBASIO AS TO BOTH COUNTS

One government witness, also an employee at the airport, admitted that the appellant Gerbasio told him he had

to go to a union meeting and that union meetings were frequent (243, 244, 245). There was not one word of testimony or showing that Gerbasio knew the time of the union meeting (259).

Still another government witness, also an employee at the airport, admitted that the appellant Gerbasio told him he had to go to a union meeting and that union meetings were frequent (243, 244, 24[illegible]). There was not one word of testimony or showing that Gerbasio knew the time of the union meeting (259).

Still another government witness, also an employee at the airport, admitted that while a driver was assigned to a job, a driver such as the co-defendant could select a helper, with that witness' consent, admitting however that even if Gerbasio had no assignment he still could have gone as a helper without the witness knowing it. Another employee showed that Gerbasio was a "stand-by employee", that is he had no regular assignments (266-268, 272).

The observations as to the appellant helping to fuel the truck were not probative of guilt. It was just another piece of cumulative evidence, that in no way established the real essence of the crime, knowledge of the nature of the cargo. There was no showing that the appellant Gerbasio had a stake in the venture or wanted it to succeed. He did not aid in loading the cargo, or handling the cargo in any

way, or negotiate for its availability. With the contrived causation of the theft, by the authorities, the target was not Gerbasio. As for his explanation, such was consistent with innocence. But if it weren't consistent with innocence, that is it was a falsehood or consciousness of guilt, such evidence was consistent with flight, or a crude attempt to avoid involvement. There is no claim or showing that Gerbasio was a hardened criminal having had past contact with lawyers, agents, trials and all the machinery of criminal justice so that he was a sophisticated wrong-doer, seeking to talk his way out or so sophisticated that he knew what his rights were or understood them.

Appellant therefore selects U.S. v. Johnson, 513 F. 2d 819 (Cir. 2d, 1975) as a point of reference. The personnel in that case were two youths. One named Loewe and the other Johnson. They were charged with importing drugs into the United States under the substantive counts of the indictment, and of course an extra count charging conspiracy. Johnson went to trial. The facts before this Court reviewing the conviction disclosed that both defendants were close friends. Johnson at the time in question visited Loewe at his home to give Loewe's parents a Christmas gift. Loewe's parents were not there to receive it. Subsequently Loewe and Johnson went to Canada staying at a motel. When Johnson was asleep, Loewe left the room and procured the drugs from a supplier. He concealed the drugs in the panel

of a door in the passenger side of his car.

Loewe rejoined Johnson and they subsequently engaged in a drinking and eating tour in Canada, inquiring of the availability of motorcycle parts. Ultimately they drove to the United States, Loewe driving the car. Crossing the border, a Customs Agent asked them the purpose of the trip and was told that the purpose was to buy motorcycle parts. Johnson seemed "nervous" to the Customs Agent resulting in a secondary search. This search turned up the drugs. This Court reversed the conviction, it being noted that both defendants were close friends and that Johnson knew that Loewe at that time was on probation from a state court. It was further found that Johnson knew also that the co-defendant was not allowed to leave the United States. That Johnson made false statements to the Customs Agents in an attempt to get himself out of the difficulties.

On page 823 it was stated in part that:

> "...It is well established, however, that in order to be an aider and abettor a defendant must associate himself with the venture in some fashion, participate in it as something that he wishes to bring about or seek by his action to make it succeed ..." (Omitting internal quotations and citations).

This Court also stated that the same rule is similar to fastening liability of an accused as a conspirator, at page 823. It was further stated that:

"... There is not an iota of evidence to connect Johnson with Loewe's acquisition, concealment, importation, use, and sale of ... No drugs were found on Johnson, nor were his fingerprints found on the plastic bag containing the ... (drugs) or in any location that would indicate that he had helped to secrete them in the passenger door of ... car ... Nor was there any showing that Johnson had ever used or sold drugs, provided Loewe with money that could be used for their purchase or had acted as a leader or lookout for him ..." (At page 823).

Continuing the Court stated on pages 823-824 that:

"Absent evidence of such purposeful behavior, mere presence at the scene of a crime, even when coupled with knowledge that at that moment a crime is being committed, is insufficient to prove aiding to abetting or membership in a conspiracy ... Guilt may not be inferred from mere association with a guilty party ..." (Omitting citations).

"The Government argues however that great weight must be placed on Johnson's admitted lies both at the time of the initial interrogation and his subsequent arrest. While false exculpatory statements made to law enforcement officials are circumstantial evidence of a consciousness of guilt and have independent probative force ... ... that falsehoods told by a defendant in the hope of extracting himself from suspicious circumstances are insufficient proof on which to convict where other evidence of guilt is weak and the evidence before the Court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the government's theory of guilt ..." (Internal citations omitted).

This Court, can in reviewing the evidence, consider whether it was "ambiguous"; see U.S. v. Robinson, Cir. C. of Apps., 2d Cir., Nov. 1, 1976, slip op. 6913 at p. 5917.

Thus, because the appellant was present at the

crucial time, namely sitting in a truck and having been observed entering the truck, does not, it is submitted, support the conviction herein. Convictions have been set aside when they were so totally devoid of evidentiary support as violative of due process of law under the 5th Amendment to the Federal Constitution. See Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. Louisville, 362 US 199 (1960); and more recently, Johnson v. Florida, 391 U.S. (1968). In that case, the defendant was found guilty under a state statute making loitering or wandering around without a lawful purpose, a state crime. The defendant in that case was sitting on a park bench and was also enjoying a probationary status following a conviction for another crime. He told this to the authorities who accosted him. His explanation didn't satisfy the authorities (as is the case here), and he was ultimately convicted. The Supreme Court of the United States set aside the conviction on the grounds there was absolutely no proof that the defendant in that case violated the statute.

In Arcinega v. Freeman, 404 U.S. 4 (1971) it was held that the fact that a person on parole by the regulations of the parole authorities could not associate with ex-convicts, did not violate such statute where he had initially contact with another ex-convict in the course of work on a legitimate job for a common employer. Such conduct standing alone was

held not to be evidence of a non-business contact violative of the parole restrictions. In Vachon v. New Hampshire, 414 U.S. 478 (1974), there before the state court the accused was charged with willfully contributing to the delinquency of a 14 year old girl who purchased a button describing various freudian diversions at a store owned by the accused. The accused admitted that he controlled the premises at the time of the sale. The proof was to the effect that the accused did not actually make the sale to the minor. It was held that the evidence was insufficient to establish that the defendant knowing the girl to be a minor personally sold her the button or personally caused another to sell it to her, the Court concluding that the conviction was violative of due process of law.

If in place of "conscious avoidance", or evasiveness upon being questioned, and the like, the defendant fled, such evidence of flight would be "consciousness of guilt". It is respectfully submitted that while there was no evidence or claim of physical flight, the evasiveness of consciousness avoidance attributed to the appellant may be considered an intangible "flight", and therefore consciousness of guilt. But consciousness of guilt, it is submitted, is the weakest type of evidence. See Wong Sun v. U.S., 371 U.S. 471, at page 483, where the Court stated that it "doubted the probative value ... of evidence that the accused fled the scene

of an actual or supposed crime".

CONCLUSION

THE JUDGMENT OF CONVICTION AS TO EACH COUNT SHOULD BE REVERSED

Respectfully submitted,

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